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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 313

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

INTERNATIONAL RICE MILLING COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF INTERNATIONAL RICE MILLING COMPANY, INC., ET AL.

HAUSER PRINTING CO., INC., NEW ORLEANS

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Respondents are International Rice Milling Company, Inc., American Rice Milling Company, Inc., Louisiana State Rice Milling Company, Inc., Kaplan Rice Mills, Inc., Joseph Dore, Sr., doing business as Supreme Rice Mill, and Monte Loving, doing business as Loving Rice Mills. Respondents are domiciled in the State of Louisiana and are doing business in the cities of Crowley, Rayne, Abbeville and Kaplan, Louisiana.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the Fifth Circuit is reported at 183 F. (2d) 21. The findings of fact, conclusions of law, and order of the Board are reported at 84 N.L.R.B. 360.

JURISDICTION

The jurisdiction of this court is invoked under section 10(e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The question presented by this case is whether a labor organization, while engaged in a strike for organizational and recognition purposes against employer A at a time when the labor organization does not represent a majority of the employees of employer A, may attempt to induce and encourage the employees of employer B by violent and non-violent means to cease transporting, handling, or otherwise dealing in the products of employer A, without violating Section 8(b)(4) (A) and (B) of the National Labor Relations Act, as amended.

STATEMENT OF THE CASE

Respondents are in the business of operating rice mills in and around Crowley, Louisiana, which is the center of the rice industry of that state. In 1946, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 201, A.F.L., hereinafter referred to as the "Union", began an organizational campaign among the employees of respondents. In February 1947, the Union could not prove its majority status among the employees of any

of respondents. In September, 1947, the Union renewed its organizational activities and in the beginning of that month called a strike among the employees of respondents. In no instance did a majority of the employees of any one of respondents go out on strike. At the plant of the Kaplan Rice Mills, Inc., none of the employees of the company went on strike, although a picket line composed of non-employees appeared in the vicinity of the plant. Some instances of violence and lawlessness were caused at the various locations of respondents rice mills as a result of the Union's attempts to have its picket lines respected. The words "buck shot" and "dynamite" were also used by the representatives of the Union in efforts to keep employees of other employers from crossing the Union's picket lines.

The question presented by this case, however, arises out of an incident which occurred on or about October 21, 1947, in the vicinity of the Kaplan Rice Mills, Inc. plant, located at Kaplan, Louisiana. On that date a truck of The Sales and Service House, driven by two employees of that firm, approached the Kaplan Mill to obtain some rice for the Sales House. The Sales and Service House is engaged in the business of selling feed and grain and it purchases some of its stock from the Kaplan Rice Mills. As the truck of the Sales House approached the Kaplan Mill, pickets of the Union stationed in the vicinity of the mill asked the driver to stop, formed a line across the street leading to the mill, and told the driver that they could not enter the mill because "we got a strike on". The driver of the Sales House truck turned around and returned to the highway where they were met by a representative of the Kaplan Mill, who suggested that the truck might be able to enter the mill by taking a different street. As the Sales House

truck approached the mill for the second time, on a different street, the union pickets came running from the first street and stoned the truck and its occupants in an effort to prevent the truck from entering the Kaplan Mill. In spite of the stoning by the Union pickets, the Sales House truck entered the mill nevertheless.

The Trial Examiner of the National Labor Relations Board found that the Union had violated Section 8(b)(4)(A) and (B) of the Act by virtue of the above related incident dealing with the employees of the Sales and Service House. The Board itself, however, dismissed the complaint with regard to the above incident for the reason that the activities of the Union there were considered by the Board to be "primary" activities and therefore were privileged under the law. Respondents petitioned the Court of Appeals for the Fifth Circuit to review the case, and that Court held that the Board's dismissal of the complaint with regard to the above incident was erroneous and that the incident constituted a violation of Section 8(b)(4)(A) and (B) of the Act. The Board petitioned for, and was granted, a writ of certiorari by this Court.

SUMMARY OF ARGUMENT

Respondents arguments in support of the decision of the Court of Appeals for the Fifth Circuit are summarized as follows:

(1) The action of the Union in this case is clearly violative of Section 8(b)(4)(A) and (B) of the National Labor Relations Act.

(2) Section 8(b)(4)(A) and (B) makes no refer-

ence to "secondary boycotts" or to "primary" or "secondary" picketing.

(3) The Board's attempt to read into Section 8(b)(4)(A) and (B) a distinction between "primary" and "secondary" picketing and to sanction violations of the law in "primary" cases is unwarranted and erroneous for the reasons:

(a) There is no room for interpretation or construction of a statute where the language is clear and there is no ambiguity.

(b) Congressional debates and committee reports can be used only to solve doubt, not to create it.

(c) There is evidence from the committee reports and congressional debate that Congress desired the result which was arrived at in this Case by the Court below.

(d) The Board's interpretation of Section 8(b)(4)(A) and (B) of the National Labor Relations Act is entitled to no special respect because of any supposed "expertness" of the Board in interpreting this law.

(4) The interpretation placed on Section 8(b)(4)(A) and (B) by the Court below leaves ample room for concerted activities by Unions and does not lead to absurd results.

(5) The interpretation placed on Section 8(b)(4)(A) and (B) by the National Labor Relations Board leads to absurd and confusing results.

(6) The presence of the proviso in Section 8(b)(4) clearly indicates that it was intended by Congress to be the only exception to the rules set out in Section 8(b)(4)(A) and (B).

I.

THE ACTION OF THE UNION IN THIS CASE IS CLEARLY VIOLATIVE OF SECTION 8(b)(4) (A) and (B) of the NATIONAL LABOR RELATIONS ACT.

For the convenience of the Court Section 8(b)(4) (A) and (B) of the National Labor Relations Act as amended is set forth below. For completeness, there is also set forth the proviso which appears at the end of Section 8(b)(4); the role of this proviso in the instant case will be discussed later in this brief.

"Section 8 * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(B) forcing or requiring any other employer to recognize or bargain with a labor or-

ganization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9;

* * * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;"

A careful reading of the above section of the law will show that the facts as set forth in the statement of the case make out a clear violation of that section. It may be helpful to present to the court a skeletonized paraphrase of the above section of the Act, interpolating the names of the parties in the instant case:

"Section 8 * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) * * * to induce or encourage the employees of the Sales House to engage in * * * a concerted refusal in the course of their employment to transport or otherwise handle * * * commodities [from the Kaplan plant] where an object thereof is:

(A) forcing * * * The Sales House to cease * * * doing business with Kaplan, and

(B) forcing * * * Kaplan to recognize or bargain with the Teamsters Union as the representative of its employees [at a time when the Union has not] been cer-

tified as the representative of such employees under the provisions of Section 9;"

Respondents submit that the action of the Union with regard to the employees of the Sales House constitutes a clear violation of Section 8(b)(4) (A) and (B) as set out above. The Union did not represent a majority of the employees of the Kaplan Mill—in fact, it appears that it did not represent a **single** employee of the Kaplan Mill, since none of the employees of the mill went out on strike. In spite of this status of representation the Union nevertheless picketed the rice mill and also actively induced and encouraged the employees of the Sales House not to make any deliveries to the Kaplan Mill. It is important to note here that the actions in question were **not** directed to the employees of the Kaplan Mill, these employees were all inside the mill working. Rather the action of the Union on its picket line was directed solely towards the two employees of the Sales House who were riding in its truck. The Trial Examiner found, and there is no question of fact involved here, that the purpose of the picket line and its activities towards the drivers of the Sales House truck was to induce those employees to cease handling the goods of the Kaplan Rice Mill; it is further without dispute that an object of the Union's activities was to force the Kaplan Rice Mill to recognize the Union as the bargaining representative of its employees, although, as mentioned above, the Union did not represent any substantial number of its employees, if it represented any at all. In determining that the above facts violated the law, the Court of Appeals for the Fifth Circuit said in part:

"The statute clearly provides a remedy for

the type of conduct engaged in by the Union without resort to any distinction between primary and secondary activities. If the Union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true 'secondary boycott' under the old common law or under any of the modern and popular theories. The Trial Examiner found that the pickets refused to allow a truck, owned by the Sales House, a neutral grain warehouse operator, to enter petitioner's mill; that when it attempted to enter on another street, the pickets threw stones at it; and that the pickets did not represent a majority of petitioner's employees * * *.

Comparing the Union's activties with the plain wording of the statute, it is apparent to us that the Union was attempting to induce and encourage the employees of the Sales House to refuse to transport or otherwise handle the goods or commodities of the rice mills. The purpose of such action was to compel the rice mills to recognize the union as a representative of its employees, although it did not represent a majority of its employees * * * To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof simply because it occurred in the vicinity of the struck employer's plant would render the section ineffective and insufficient."

On page 14 of the brief to this Court of the Board, there is found a tacit admission that the facts of the case constitute a violation of the language of Section 8(b)(4) (A) and (B). That portion of the Board's brief reads as follows:

"Read *in vacuo*, without regard to the other provisions of the act and to the legislative history which shows that Congress did not intend to outlaw primary strike pressure, 8(b)(4) (A) and

(B) would prohibit primary labor action no less than secondary labor action."

As we will show later in this brief, the Board has exaggerated the consequences of a decision by this court affirming the decision of the Court of Appeals. If this Court affirms the decision of the lower court there will still be ample room for protected activity by a Union at the site of the so-called "primary" employer's plant. However, we submit that the Board's brief has admitted that the activities of the Union in question here violate the plain provisions of Section 8(b)(4) (A) and (B). Of course, the Board goes on to say that the above section must be "construed" with the common law idea of "secondary boycott" in mind. For this reason, we discuss this term in the next section of our brief.

II.

SECTION 8(b)(4) (A) and (B) MAKES NO REFERENCE TO "SECONDARY BOYCOTTS" OR TO "PRIMARY" AND "SECONDARY" PICKETING.

Since a very casual reading of Section 8(b)(4) (A) and (B) of the Act shows clearly that the terms "secondary boycott", and "primary" and "secondary" activities or picketing are nowhere mentioned in that section it may appear naive, at first glance, to set forth a separate section of this brief to demonstrate the above fact. However, since the Board's brief has placed such great emphasis upon the distinction between primary and secondary activities as found in Section 8(b)(4) (A) and (B), and has discussed at length the secondary boycott features of the above section, respondents desire to establish clearly that such language is not to be found in the Act itself.

It is a fact that Section 8(b)(4) is commonly referred to as the "secondary boycott" section of the Act and it may be worthwhile to offer at this time an explantion for the use of that term in describing, or referring to, this section of the Act. However, as clearly expressed in the quotation immediately below, the fact that this section of the Act is referred to as the "secondary boycott" section does not establish by any method of logic that the section was designed to outlaw "secondary boycotts"—whatever that term might mean. In 1 Labor Law Journal 835,908 (1950), the able writer of that article points out that apparently Judge Rifkind was one of the first to use the "secondary boycott" appellation to refer to Section 8(b)(4) (A) and (B) of the Act. The article continues:

> "While that term is nowhere used in the Taft-Hartley Act, Judge Rifkind found, in his researches into the Act's legislative history that the term had been used on numerous occasions by members of the Senate. That it was often used is certainly no indication that the section as finally enacted was meant to outlaw only the common law boycott; it might well have been that the Senators were having the same trouble finding a shorthand term to describe the activities prohibited by Section 8(b)(4) that others are having today. Even more germane to the problem, if Congress had seen fit to outlaw only the 'secondary boycott', whatever that species of action may be, it would have been far easier, far more natural, for Congress simply to say so rather than to engage in all the effort which undoubtedly went into drafting Section 8(b)(4) in its present form."

Although the Board seems reluctant to acknowledge that the act does not contain the terms "secondary boycott" and "primary" and "secondary" activities or

picketing, the United States Court of Appeals have made that discovery. For example, in the opinion below in the instant case, the Court said:

> "The Board attempts to draw a fine distinction between primary and secondary action. Although the term 'secondary boycott' does not appear anywhere in the section, the section itself is often referred to as the 'secondary boycott' section, and is most commonly understood to make secondary boycotts an unfair labor practice. **We know of no accurate definition for the term 'secondary boycott'.**" (Emphasis added.)

In *N.L.R.B. vs. Wine, Liquor & Distillery Workers*, 178 F. (2d) 584 (C.A.-2-1949), the Court of Appeals for the Second Circuit stated:

> "In view of Senator Taft's statement about the meaning of the section, it seems idle for the respondent [the Union] to argue that only such 'secondary boycotts' as were unlawful in common law, or under the law of some particular state, fall within the prohibitions of the section."

And in *Printing Specialties & Paper Converters Union vs. LeBaron*, 171 F. (2d) 331 (C.A.-9-1948), the court said:

> "Appellants say they were merely picketing Sealright's product and were not engaged in a secondary boycott as that term is commonly understood. The statute however, does not use the term 'hot cargo', 'picketing the product', or 'secondary boycott.' It broadly sweeps within its prohibition an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest."

And in *I.B.-E. W. vs. N.L.R.B.*, 181 F. (2d) 34 (C.A.-2-1950), Judge Clark, dissenting, and being unable

to reconcile some conflicting decisions by the Board, stated:

> "Perhaps the difficulty comes from the use of those vague terms 'primary' and 'secondary', which are not terms of either science, art or of the statute and **which serve only to confuse and to contradict.**" (Emphasis added.)

III.

THE BOARD'S ATTEMPT TO READ INTO SECTION 8(b)(4) (A) and (B) A DISTINCTION BETWEEN "PRIMARY" AND "SECONDARY" PICKETING AND TO SANCTION VIOLATIONS OF THE LAW IN "PRIMARY" CASES IS UNWARRANTED AND ERRONEOUS.

A.

There is no room for interpretation or construction of a statute where the language is clear and there is no ambiguity.

As shown by the Board's decision in this case and also by their brief presently before the court, the Board has made major interpretations of Sections 8(b)(4)(A) and (B) by reading into that section a congressional intent to distinguish between primary and secondary activities or picketing and a further congressional intent that while secondary picketing and activities were to be unlawful, the primary activities were to be lawful. In order to demonstrate this interpretation, the Board has plunged into the mass of congressional reports and debates which preceded the passage of the amendment to the National Labor Relations Act.[1] Basically the ques-

[1] The Board's brief also quotes from a committee report which was prepared after the passage of the Taft-Hartley amendment to the Act. See pages 72-75 of the Board's brief. We submit that it is going afield to find the method of applying a statute by looking in a report prepared after the statute has become law.

tion before the court in the instant case is one of statutory construction. It is a question of interpreting the provisions of Sections 8(b)(4) (A) and (B) of the National Labor Relations Act, applying that interpretation to the facts of the case, and announcing the result. The rules of statutory interpretation are many, and the cases which have arisen in this court setting forth the rules are very many. However, the cardinal rule, the first rule of statutory construction is that if the language of the statute is clear, unambiguous, and not beyond the limits of the constitution, then no further interpretation is necessary. In *United States vs. Hill*, 248 U.S. 420, 63 L. Ed. 337 (1919), the court stated:

> "The meaning of the act must be found in the language in which it is expressed, when as here there is no ambiguity in the terms of the law."

In *Adams Express Co vs. Kentucky*, 238 U.S. 190, 59 L. Ed. 1267 (1915), the language is found:

> "It is elementary that the first resort, with a view to ascertaining the meaning of a statute is the language used. If that is plain, there is an end to construction and the statute is to be taken to mean what it says."

In *U. S. vs. Ewing*, 184 U.S. 140, 46 L. Ed. 471 (1902), the court stated:

> "It is said that as thus construed the statute leads in many cases to great injustice, and hence such a construction should not be adopted. The difficulty is that any other construction violates the clear directions of the law, and although the result may be to withhold its benefits from some who might be regarded as otherwise entitled to it, yet we cannot for that reason alter its terms so as to include them and thus ourselves enact instead of construing the law."

In *Caminetti vs. United States*, 242 U.S. 470, 61 L. Ed. 442 (1917), the court stated:

> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton vs. Rathbone*, 175 U.S. 414 * * *."

Other cases may be cited to demonstrate this same rule. *Commissioner of Immigration vs. Gottlieb*, 265 U.S. 310, 68 L. Ed. 1031 (1924); *Bate Refrigerating Co. vs. Sulzberger*, 157 U.S. 1, 39 L. Ed. 601 (1895).

It is submitted that the language of Section 8(b)(4)(A) and (B) is clear. The Board has not pointed to a single vague or ambiguous word in this part of the Act. It must be assumed that Congress intended what it said in plain language and the Board should be directed in this case to apply the language of the Act as it is written—not as the Board believes it should have been written.

B.

Congressional debates and committee reports can be used only to solve doubt, not to create it.

As a corollary of the rule set forth in the preceding subheading, we also find among the decisions dealing with statutory interpretation the rule that reports of congressional committees and statements of congressional leaders may not be used to interpret a statute where the statute itself is unambiguous and requires no interpretation. A clear example of the application of this rule by this court, and an application which refutes the position which the Board has taken, is found in *Caminetti vs. United States, supra*, which dealt with a con-

viction arising under the White Slave Traffic Act. The accused caused a woman to be transported in interstate commerce in order that she would become his mistress or concubine. His defense to the accusation, in part, was that the statute sought to make unlawful such transportation only where the purpose was to place the woman in the **business** of prostitution, not where it was an isolated instance for a private purpose. In support of this argument the accused cited the report which accompanied the introduction of the statute in the House of Representatives, the report showing that the statute was aimed at **commercial** vice. This court, in affirming the conviction, reiterated the foregoing rule that there was no need for construction when the statute was plain on its face and then went on to state:

> "Reports to Congress accompanying the introduction to proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. [Citing cases.] But as we have already said, and it has been so often affirmed as to become a recognized rule, **when words are free from doubt they must be taken as the final expression of the legislature's intent and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction or from any extraneous source.**" (Emphasis added.)

We quote below other similar statements made in decisions by this court:

> "Committee reports and explanatory statements of members in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute **where its language is doubtful or obscure.** *Duplex Printing Press Co. vs. Deering*, 254 U.S. 443, 65 L.

Ed. 354. But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation. *Pennsylvania R. Co. vs. International Coal Min. Co.*, 230 U.S. 184, 57 L. Ed. 1446; *Caminetti vs. United States*, 242 U.S. 470, 61 L. Ed. 442. **Such aids are only admissible to solve doubt, and not to create it.**" *Railroad Commission vs. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 66 L. Ed. 371 (1922). (Emphasis added.)

"Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others." *Mackenzie vs. Hare*, 239 U.S. 299, 60 L. Ed. 297 (1915).

And in a recent decision of this court, *Ex Parte Collett*, 337 U.S. 55, 93 L. Ed. 1207 (1949), Mr. Chief Justice Vinson stated the rule in the following language:

"Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Section 1404 (a), but from its legislative history. **The short answer is that there is no need to refer to the legislative history where the statutory language is clear.** The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco, Inc. vs. Walling*, 324 U.S. 244, 260, 89 L. Ed. 921, 933, 65 S. Ct. 605 (1945). **This canon of construction**

has received consistent adherence in our decisions." (Emphasis added.)

C.

There is evidence from the committee reports and congressional debate that Congress desired the result which was arrived at in the instant case by the Court of Appeals.

We have urged above that there is no justification for turning to the legislative history of the Act in order to interpret Sections 8(b)(4) (A) and (B). We say that that section is clear and unambiguous and can be easily applied by a careful reading of its language. As an alternative argument and only in the event that this Court should feel that it should look at the legislative history of the Act, however, we would like to point out that in the legislative history there are references which would lead to the conclusion that Congress did intend that the result obtained by the Court of Appeals in the instant case was the proper result.

For example, in Senate Report No. 105, 80th Congress 1st session, 22, we find the language " * * * strikes and boycotts for recognition are not made illegal if the union has been certified as the exclusive representative." Almost identical language is found in the House Conference Report No. 510, 80th Congress, 1st session, 43, " * * * strikes and boycotts for recognition were not prohibited if the union has been certified as the exclusive representative." Applying the above thought to the facts of the instant case, it would appear that if the Teamsters Union in the instant case had been certified as the bargaining representative of Kaplan's em-

ployes, there would be no prohibition against a strike or boycott by that union. Conversely, it would appear that under the facts as they actually existed, a strike or boycott for recognition by the Teamsters Union would be prohibited by the Act.

This is further buttressed by the provision in Senate Report No. 105, 80th Congress, 1st session, 23, in which the following language is found regarding the proviso at the end of Section 8(b)(4):

> "Attached to Section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a Union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strike breaking activities would not be deemed an unfair labor practice **unless the strike is a 'wildcat' strike by a minority group.**" (Emphasis added.)

As will be discussed later in this brief, the proviso to Section 8(b)(4) plays an important role in the application of the subsection. However, for the purpose of the present discussion, the emphasized portion of the Senate Committee Report indicates clearly that if the strike is called by a minority group, or a "wildcat" strike has been called, then the refusal to cross a picket line might be deemed to be an unfair labor practice. In view of the fact in the instant case that the union involved was definitely a minority union, it would appear that the result reached in the instant case by the lower court would be very much in accordance with the discussion found in the Senate Committee Report, above quoted.

Further, Senator Taft described a situation very similar to the facts of the instant case when he was explaining to the Senate what the purposes of Section 8(b)(4) were. His remarks were directed to what is apparently a practice of some unions of organizing a plant from "the top down", i.e., by putting such immediate and strong economic pressure on an employer that he will recognize the union regardless of whether his employees are members of that union. The Senator's statement was:

> "It is made an unfair labor practice for any union **to engage in an indirect organizational strike.** That is to say, the teamsters cannot go to a store and say 'unless you sign up with the clerks' union, we are going to boycott your store,' unless the clerks' union has been certified as a bargaining agent by the National Labor Relations Board * * *
>
> **"I think the committee all agreed that those types of strikes are in effect racketeering strikes.** They are strikes which are not direct strikes to settle questions of wages or hours or better working conditions. They are strikes which are, in effect, attempts to bring indirect pressure on third parties, to get third parties to work in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power." (Emphasis added.) 93 *Congressional Record* 3838, April 23, 1947.

Finally and only in the event that the court should feel any need to examine the legislative history of the Act, we would ask the question of the Board, just what was meant in the various committee reports and in the statements by the various senators when they referred to "secondary boycotts"? It should be noted that in the

Board's argument in this case, it has attempted to show that we must resort to the legislative history to discover the true meaning of the Act. The Board shows us the legislative history which is abundant with references to "secondary boycotts." However, the Board discusses "secondary boycotts" only slightly in its brief, and prefers to discuss its distinction between "primary" and "secondary" activities. It would be interesting to determine exactly what the term "secondary boycott" meant to all the people who used it during the course of the legislative history of this statute. In a footnote below we have set out an interesting comment on the definition of "secondary boycott".[2] However, we question whether any of the definitions of "secondary boycott", as found in the cases cited in the footnote, is the concept which was in the minds of the persons who drafted the Act, or whether, having arrived at the language which is now section 8(b)(4), the drafters of the Act decided to term that language the "secondary boycott section" of the Act. In other words, did the legislators have a clear understanding of the nature of a secondary boycott before they wrote Section 8(b)(4) and accordingly put into that section what they understood a secondary boycott to be; or was it that the legislators wrote Section 8(b)(4) to put an end to certain abuses which had grown

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[2] "Taft-Hartley and the 'Secondary Boycott'", Sylvester Petro, 1 Labor Law Journal 835, 908-909 (1950). The following language in the article is supported by numerous citations: "One of the profound difficulties in this approach, as many labor law students will appreciate, is that, of all areas of the common law of labor relations, that relating to the 'secondary boycott' was probably the most confused. There was, and is, confusion with respect to both the physical facts which amount to a 'secondary boycott' and the applicable law. The confusion was, and is, rife and rampant. It is not merely that the courts of the respective states differ with regard to these matters. Confusion and conflict characterize the decisions even within given states. Reference to the cases cited in the footnotes, which give only a hint of the prevailing chaos in the common law of 'secondary boycotts' will show that the quest for understanding is not served by rejecting the express terms of Section 8(b)(4)(A) in favor of the common law."

up in the labor relations field and having spelled out those abuses, then selected the term "secondary boycott" to refer to the section? Did the draftsmen of the Act write Section 8(b)(4) to curtail specific union activity or did they write the Section to define a "secondary boycott"? Manifestly, unless the draftsmen of the Act were thinking of a specific definition of "secondary boycott", and that chanced to be the very same definition which the Board has of that term, the Board's distinction between "primary and secondary" activities is completely unfounded both in the law and its legislative history as well.

D.

The Board's interpretation of Section 8(b)(4) (A) and (B) of the Act is entitled to no special respect because of any supposed "expertness" of the Board in interpreting this law.

On page 62 of the Board's brief, there is found a suggestion by the Board that this court's function in the instant case is limited to determining whether the Board's decision has a "warrant in the record" and "a reasonable basis in law." On the same page, and on the next page, we run across the phrases "uniformity", "technical expertness", and "continuous attention and a clearly allocated responsibility". We are not sure whether the Board is suggesting that its interpretation of law carries a *prima facie* presumption of correctness. If this is the suggestion of the Board we do not agree with it.

If there was ever any validity to the argument that because of its "expertness" the Board's conclusions as to statutory meanings outweigh those of the court, such an argument can have no possible validity as applied to the provisions now under consideration. Attention of

the Court is directed to Section 303 of the Labor Management Relations Act of 1947. This Section 303 contains language identical to that of Section 8(b)(4) (A) and (B) and provides a cause of action for anyone injured as a result of a violation of the provisions of the section. The cause of action shall be heard in the District Courts of the United States, and Section 301 of the Act provides the rules regarding jurisdiction and venue. Thus, since the interpretation of Section 303 of the act is entrusted exclusively to the courts, and since it is identical in language with Section 8(b)(4) of the Act, it cannot be supposed that Congress intended to bind the courts with the Board's notions of the meanings of the language in question. The language is to be interpreted by the courts in accordance with established rules of construction, fundamental among which, as we have stated heretofore, is the rule that Congress must be taken to have meant what it very plainly said. Congress did not choose to talk in terms of "primary" or "secondary" boycotts, but chose instead to prohibit in sweeping terms "an entire pattern of industrial warfare" (*Printing Specialties and Paper Converters Union vs. LeBaron, supra*). Whether or not a particular aspect of that pattern falls within the Board's concept of "secondary" activity is immaterial.

IV.

THE INTERPRETATION PLACED ON SECTION 8(b)(4) (A) AND (B) BY THE COURT OF APPEALS LEAVES AMPLE ROOM FOR CONCERTED ACTIVITIES BY UNIONS AND DOES NOT LEAD TO ABSURD RESULTS.

The Board has stated in its brief that the denial by this Court of the distinction between "primary" and "secondary" activities would place such a great restraint

upon labor organizations that Congress could not possibly have meant what the language of the Act says. The Board indicates that unless the right of a labor organization to engage in privileged "primary" activities is protected by this court these employees would be denied the right of peacefully picketing the immediate business of their employer.

We submit that such a result will not obtain in the event that this court affirms the decision of the Court of Appeals. We say that there is no great dilemma here, that the court either must recognize the unwritten distinction in the law between "primary" and "secondary" boycotts and activities or else prohibit all basic activities and picketing by labor organizations. For example, under the interpretation of the law as we suggest to this court, and particularly under the interpretation of the proviso at the end of Section 8(b)(4) as will be discussed later, Section 8(b)(4) (A) and (B) has no application whatsoever to action or activities by a Union which represents a majority of the employees of the so-called "primary employer", and which peacefully seeks to discourage other employees from entering the struck plant. If the union seeks to induce employees of other employers to refuse to handle the commodity of the struck plant away from the struck plant, such action would be unlawful under respondents theory, and also under the Board's theory of "secondary" activity, apparently.

In addition to the field for labor activities mentioned above for a majority union, there is also left a broad field of action by a minority union. Actually, 8(b)(4) (A) and (B) prohibits a minority union from inducing or encouraging strike action by the employees

of another employer. Thus, a minority union may strike and picket where its activities are directed at anyone, except the employees of another employer. For example, in the instant case there would be nothing unlawful under our interpretation of Section 8(b)(4) (A) and (B) if the union's picketing activities had been directed at the employees of the Kaplan Rice Mill. As a matter of fact, since the union was seeking to organize these employees and seeking to obtain recognition from the employer, it would seem most apparent that the employees of the Kaplan Mill should have been the people to whom the union directed its attention, rather than to employees of some other employer. In addition, the picketing minority union may bring pressure, including economic coercion upon a neutral or "secondary" employer. This was the decision of the Court of Appeals for the Ninth Circuit in *Schatte vs. International Alliance*, 182 F. (2d) 158 (C.A.-9-1950). Furthermore, the picketing minority union may seek to induce or encourage or put pressure upon customers of the primary employer *Consolidated Frame Co.* 91 N.L.R.B. No. 197 (1950), or upon supervisory employees of another employer. *Arkansas Express Inc.*, 92 N.L.R.B. No. 64 (1950).[3]

To summarize this section of our argument, it can be stated succinctly that the interpretation of Section 8(b)(4) (A) and (B) which we seek to have this court pronounce will actually interfere with activities of labor organizations only in those limited number of cases in which the organization is a majority union and seeks

[3] These last cases illustrate the inconsistency of the Board's reasoning. In the instant case the Board refuses to apply the language in Section 8(b)(4) (A) and (B) because the facts of the case do not amount to the Board's idea of a "secondary boycott". However, in the cases cited in the text above, in situations which would appear to be "secondary boycotts", the Board refuses to find a violation of the law because the facts of the case do not meet the requirements of the statute.

to induce employee action which is "secondary" (and thereby unlawful) under the Board's theory or is a minority representative and is seeking to induce the employees of another employer to engage in a concerted refusal to strike or to refuse to handle certain goods. The dire consequences predicted by the Board will not follow—there will remain to all labor organizations the right to strike and picket for whatever purposes are otherwise lawful if this court affirms the decision of the Court of Appeals. The result which we seek is not absurd, nor does it by any stretch of the imagination exceed the constitutional limitations placed upon Congress.

V.

THE INTERPRETATION PLACED ON SECTION 8(b)(4) (A) AND (B) BY THE NATIONAL LABOR RELATIONS BOARD LEADS TO ABSURD AND CONFUSING RESULTS.

The Board has stated in its brief that the contentions of respondents would lead to absurd results and would be far beyond the intention of the legislators who drafted Section 8(b)(4) (A) and (B). We submit that the reverse of that statement is correct,— that the interpretation sought by the Board leads to absured and confusing results. To illustrate this let us examine some of the decisions reached by the Board in handling Section 8(b)(4) (A) and (B) of the act and also some of the positions which the Board has taken before the courts with respect to the same section.

At the outset in examining the decision of the Board in the instant case [4] it will be noted that the Board decided that the Union's activities in this case were "pri-

[4] 84 NLRB 360 (1949).

mary" because they "were carried out in the immediate vicinity of that mill". It would seem therefore that the Board had set up a simple **geographical** test to determine the difference between primary and secondary activities, i.e., if the Union's activities occur in the vicinity of the so-called primary employer's plant, then these activities are "primary" and are privileged under Section 8(b)(4) (A) and (B). If the activities occur elsewhere, then it would seem to follow that the activities were "secondary" and accordingly not privileged under Section 8(b)(4) (A) and (B).

However, the Board apparently ran into difficulty in attempting to apply this simple rule. In *Teamsters Local No. 807 and Schultz Refrigerated Service, Inc.*, 87 N.L.R.B. No. 82 (1950) the Union had a dispute with a trucking company. Although the Union placed no pickets in the vicinity of the company's office or in the vicinity of the company's terminal, it did follow the company's trucks on its routes and when these trucks would stop to make deliveries, the pickets would picket the truck itself. In this case, the Board decided that the action of the Union was lawful because **the site of the dispute was the truck itself**, and that therefore wherever the truck would drive the primary dispute would follow. This decision seemed to establish a rule of a "roving site" of a labor dispute; obviously the basis for such a rule cannot be found in the language of Section 8(b)(4) (A) and (B).

In *N.L.R.B. vs. Denver Building and Construction Trades Council*, No. 393 of the Docket of this Court, the labor organization involved had a dispute with the electrical sub-contractor on a certain construction job. The contractor and the other sub-contractors employed union labor but the electrical sub-contractor employed

non-union labor. The labor organization placed a picket at the site of the job and apparently thereby induced the union employees on the job to walk off. In that case the Board has apparently abandoned its geographical test of primary and secondary activities, because although the picketing occurred at the site of the primary dispute, the Board is asking this Court to find that the actions of the labor organization violated Section 8(b)(4)(A) of the act.

In *International Brotherhood of Electrical Workers vs. N.L.R.B.*, 181 F. (2d) 34, (C.A.-2-1950), the facts were similar to that which were found in the *Denver Building Trades Council Case, supra*, in that the Union involved conducted picketing at the site where the construction work was going on. However, the picketing which induced the union employees to quit the job, was conducted at a time when the non-union employees were temporarily absent from the job. In that case the Court of Appeals for the Second Circuit held that the picketing by the Union was unlawful, in accordance with the decision and order by the Board. Apparently, in this last mentioned case, the Board has again abandoned its geographical test between primary and secondary activities and is looking rather at which group of employees were induced by the Union, i.e., the employees of the so-called "primary" employer or the employees of the so-called "secondary" employer. Again, it should be noted that this distinction and this test are not found within the language of the law.[5]

[5] It is difficult to draw a distinction between the Board's theory in that case and its theory in the case presently before the Court. It should be remembered that in the instant case, although the picketing was within some 300 feet of the plant, the pickets moved from their original stations, ran to the next street to meet the Sales House truck, and stoned it. It cannot be said that these actions were directed at the employees of the Kaplan, who would be the "primary" employer in the instant case.

In *Di Giorgio Food Corp. vs. N.L.R.B.*, 87 N.L.R.B. No. 125, No. 10,605 of the docket of the Court of Appeals for the District of Columbia (under advisement), the Board has enunciated a still different type of rule in distinguishing between "primary" and "secondary" activities. In that case the Union while engaged in a strike at the premises of the "primary" employer, attempted to stop trucks of other employers from entering the plant. One of the drivers of the trucks—who was an employee of another employer and by coincidence was also a member of the striking union,—crossed the picket line. The Union, at a meeting held many miles distant from the situs of the primary dispute, voted a fine of $1,000 against the driver who crossed the picket line and disseminated that fact to the other drivers. Such action by the Union should be clearly violative of the language of Section 8(b)(4)(A). However, the Board has taken the position that this action by the Union was lawful, apparently for the reason that although the inducement of the employees of the "secondary" employer occurred at the Union meeting many miles away from the site of the dispute, the action which the Union sought to occasion by its inducement, i.e., a refusal by the employees of another employer to cross the picket line, would have occurred at the site of the "primary" dispute. The Board has apparently arrived at this conclusion by applying to the facts of this case, as well as all of the cases cited in this section of our argument, its own notions of the distinction between "primary" and "secondary" activities. It appears that the Board makes its decisions as to what is "primary" and what is "secondary" only after the case has been presented to it for decision.

As a further illustration of how the interpretation

placed on Section 8(b)(4) (A) and (B) by the Board distorts the Act, we refer the court's attention to the proviso contained at the end of Section 8(b)(4). We submit that the interpretation placed upon this section of the act by the Board has the effect of nullifying the proviso, and actually treats the proviso as though it were not written. Of course, it is axiomatic that significance and effect must be accorded to every word and section of a statute and that meaning must be given to each part of the statute. *Washington Market Co. vs. Hoffman*, 101 U.S. 112, 25 L. Ed. 782 (1879); *D. Ginsberg & Sons vs. Popkin*, 285 U.S. 204, 76 L. Ed. 704 (1932); *MacDonald vs. Thompson*, 305 U.S. 263, 83 L. Ed. 164 (1938). Yet the interpretation placed by the Board violates this cardinal rule of statutory interpretation for the reason that the Board's interpretation gives no meaning whatever to the proviso.

The proviso to Section 8(b)(4) reads as follows:

> "**Provided** that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified by a representative of such employees whom such employer is required to recognize under this act."

It is submitted that the purpose of the above proviso was to privilege and make lawful, the refusal by employees to cross a picket line under the circumstances set forth namely, where the picket line was established by a union with whom the employer was required to deal under the provisions of the Act. This proviso means that a union which represented a majority of the employees of a plant **could** lawfully enlist the aid of

employees of other employers not to cross the picket line established at the plant of the "primary" employer in order to force the "primary" employer to recognize the Union as the representative of its employees, or to bring a cessation of business between the "primary" and "secondary" employees. "The proviso expressly privileged a favorable response from other workers to requests by strikers for secondary aid, in certain circumstances; and if the favorable response were privileged, it could scarcely be reasoned that the request for such response would be held unlawful. Furthermore, if the proviso were to be given meaning it would have to be related more directly to the inducing union than to the responsive employees. This followed because the act nowhere makes action by individual employees unlawful, and thus the privileging of individual action by itself would be pointless. If the proviso were to be given point, therefore, it would have to be read as privileging the action of the striking union—action which might otherwise be unlawful under the broad wording of Section 8(b)(4)(A)."[6]

It is submitted that the purpose of the proviso at the end of Section 8(b)(4) is to make lawful certain activities conducted by a majority union which would otherwise be unlawful under that section. But the interpretation placed on this section by the Board does not take into account the existence of the proviso—rather it considers a distinction between "primary" and "secondary" boycotts and activities. In the proceedings before the Board in the instant case, the Board made no reference whatever to the proviso or its possible effect upon

[6] Petro, "Taft-Hartley and the Secondary Boycott", 1 Labor Law Journal 835, 836 (1950). The Court's attention is directed to the following recent articles which also discuss the effect of the proviso. Tower, "The Puzzling Proviso", 11 Labor Law Journal 1019 (1950); Petro, "The Enlightening Proviso", 1 Labor Law Journal 1075 (1950).

the facts of the instant case. In the Court of Appeal the Board referred to the existence of the proviso only in a footnote in its brief. In the brief submitted to this Court, the Board has finally attached some importance to the proviso and does discuss it. However, it is most interesting to note that the Board's discussion in its brief is limited to an effort to show that the proviso does not apply to the instant case, and the Board's brief concludes its discussion of the proviso with the amazing statement:

> "The Board has deliberately abstained from delineating the meaning of the proviso in its relationship to Section 8(b)(4) (A) and (B) for the problems it raises are many, and as in this case, their resolution has thus far been unnecessary to the interpretation of Section 8(b)(4) (A) and (B)."[7]

The Board goes on to offer illustrations of the method in which the proviso may be interpreted. It reproduces as an appendix to its brief the opinion of one of its Trial Examiners as to the meaning of the proviso at the end of Section 8(b)(4), but the Board carefully notes that in setting forth the opinion of its employee, it does so "without inferentially subscribing to the views there expressed * * *." In other words, the Board is asking this court to construe and interpret Section 8(b)(4) (A) and (B) in the light of its legislative history and to ignore the vital language of the Act itself in applying it to the facts of the instant case.

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[7] Footnote 74, pp 80, 81 of Board's brief.

VI.

THE PRESENCE OF THE PROVISO IN SECTION 8(b)(4) CLEARLY INDICATES THAT IT WAS INTENDED BY CONGRESS TO BE THE ONLY EXCEPTION TO THE RULES SET OUT IN SECTION 8(b)(4) (A) and (B).

We have submitted heretofore in our brief that the language of Section 8(b)(4) (A) and (B) is clear and does not require resort to rules of construction in order to determine its meaning. We have also shown that the effect of the proviso at the end of Section 8(b)(4) is to qualify the provisions of Section 8(b)(4). However, in the event that this court should feel that a resort to canons of construction becomes necessary in this case in order to determine the meaning of Section 8(b)(4) (A) and (B), we then submit to the court that the maxim "*expressio unius est exclusio alterius*" is applicable to this situation.

We submit that this maxim is applicable to the wording of Section 8(b)(4), in the event that the court feels that any rules of construction need be applied, for the reason that Section 8(b)(4) (A) and (B) sets out a general rule declaring certain activities unlawful, and then the proviso to the section excepts from the application of the section certain specified activity induced by a majority union. In other words, we say that since Congress saw fit to make an exception to the rule set forth in the Section 8(b)(4) (A) and (B), and set forth that exception in a specific proviso, Congress intended that exception to be the only exception to the rule.

In *Botany Worsted Mills vs. United States*, 278 U.S. 282, 73 L. Ed. 379, 385 (1929) we find the language:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. *Raleigh & G. R. Co. vs. Reid*, 13 Wall. 269, 270, note 20 L. Ed. 570; *Scott vs. Ford*, 52 Or. 288, 296, 97 Pac. 99."

Other cases exemplifying the same rule are *Bend vs. Hoyt*, 13 Pet. 263, 10 L. Ed. 154, 158-159 (1839); *Kendall vs. United States*, 107 U.S. 123, 27 L. Ed. 437 (1883).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be affirmed.

BALDWIN, HASPEL & MOLONY;
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New Orleans, La.
February 16, 1951.

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